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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

COUNTY OF DUVAL, ET AL,
Petitioners,
v.
ANTONIA PEREZ, ET AL,
Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are elected officials entitled to implement their electorial mandate to reorganize county government and eliminate a county department when reorganization and elimination result in discharge of employees who supported opposition candidates.

2. Do elected officials satisfy the burden of justifying employment termination decisions involving personnel who supported opposition candidates by showing that the decisions are reasonable in light of budgetary constraints or are elected officials required to prove that personnel cutbacks are the only satisfactory means of easing budgetary constraints.

3. To the extent that this Court's decisions in *Rutan v. Republican Party*, *Branti v. Finkel* and *Elrod v. Burns* may appear to limit elected officials' ability to reorganize and restructure county government in compliance with the mandate of the voters, should they be overruled as inconsistent with the voters' fundamental right to structure their representative government.

PARTIES TO THE PROCEEDINGS

Petitioners are the County of Duval, Texas, The Commissioners Court of Duval County, Texas, Frank J. Garcia, former County Judge, Commissioners Bob Lee, Alejo Garcia and Richard Barton and former Commissioner Sigifredo Flores. Petitioners were the appellants before the Fifth Circuit Court of Appeals and defendants in the trial court.

Respondents, all of whom are appellees in the Court of Appeals, are Antonia B. Perez, Pablo Chavera, Elpidio De La Garza, Jesus Salazar, Juan Ramirez, Juan H. Barrera, Salvador S. Garcia, Sylvia L. Saenz, Lydia C. Perez, Diamantina Davila, Cecilio Alaniz, Oralia Arredondo and Richard D. Martin. Respondents were plaintiffs for whom judgment was entered by the district court.

The claims of Plaintiffs Olivia Bernal, Janie Ruiz, Ninfa Chavera, Trinidad Alaniz, Elia Garcia, Pete Luna, Blanca Garza, Lydia Trevino and Luis Martinez were dismissed by the district court. These nine Plaintiffs did not appeal dismissal of their claims to the Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The County of Duval, et al, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 1, 1992.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Fifth Circuit is unreported. The decision affirmed as modified the judgment of the United States District Court for the Southern District of Texas, Civil Action No. C-87-17 (S.D. Tex. Mar. 25, 1991). The Opinion of the Court of Appeals is reprinted as Appendix A; the Judgment of the district court is reprinted as Appendix B; the district court's Order Denying Motions for Judgment Notwithstanding The Verdict is reprinted as Appendix C.

STATEMENT OF JURISDICTION OF THE COURT

The Judgment of the Court of Appeals for the Fifth Circuit was entered on July 1, 1992, and a timely Suggestion For Rehearing En Banc was denied August 12, 1992 (App. D). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and Statutory Provisions involved in this proceeding are the First Amendment to the United States Constitution and 42 U.S.C. § 1983 pertaining to civil actions for deprivation of rights.

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. 1

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

> deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

A. Summary of Facts

In the 1986 Democratic Primary, Petitioners Frank Garcia, Bob Lee and Sigifredo Flores challenged incumbent Judge Gilbert Uresti[1] and Commissioners Carolina Saenz and Sonny Widerkehr for election to the County Commissioners Court of Duval County, Texas. Petitioner Richard Barton and Alejo Garcia were incumbent Commissioners philosophically aligned with Garcia, Lee and Flores. The election occurred at a time of a shrinking County tax base and a looming budget deficit. Petitioners ran on a ticket stressing governmental economy and efficiency, budget reform and wide ranging structural change including elimination of the Fifth Precinct/Countywide department.

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1. At the time of the 1986 Primary, Gilbert Uresti had held the office of County Judge for more than eleven years. (R. Tr. Vol, 5, p. 916). The record reflects that all but one of the Respondents first became employed by the County during Judge Uresti's administration.

In many respects the "fifth precinct" was a relic of patronage politics which provided the County Judge with authority over employment decisions which ordinarily would reside in the individual commissioners.[2] The countywide/fifth precinct was unique to Duval County and the voters were largely unaware that it existed. As explained by Commissioner Lee,

> The Fifth Precinct was an example, the major example, of the wa[ste] that we saw. The four Commissioners' precincts cover the entire county. There's a commissioner that has the duty to each part of the county. There's no square foot of County that's not covered. Countywide precinct was looked at as just extra. *It was some place to put employees*. I think it was 18 employees when we took office. That was more than I had in my precinct. The Countywide budget was larger than the precinct budget was. And there was no job, really. The people in Freer couldn't see what the reason was. Anything they could do should have been done by the Commissioners.

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2. As former County Judge Garcia explained, "the county judge then had people working under him that were mechanics. They were heavy equipment operators. They were bridge inspectors or road inspectors; Whereas I knew that was not one of the duties of the county judge. So, therefore, I felt it totally unneeded, the whole system of countywide was--*no other county in the State of Texas has such a system.*" (R. Tr. Vol. 3, pp. 436-437, *see* also Vol. 2, pp. 335-336; Vol.4, p. 627). The fifth precinct effectively shifted some level of responsibility and, therefore, power, from the commissioners to the county judge. Elimination of the fifth precinct shifted responsibility back to the individual commissioners.

> So, they looked at it as a waste. And, like- *most people didn't even know it existed* until we brought it up in the campaign and *when they found out about it, they didn't like it. They wanted to get rid of it.* And that was one of my campaign points.

(R. Tr. Vol. 5, p. 861) (Emphasis added). Elimination of the countywide department and streamlining government were the cornerstone of Petitioners' campaign platform. (R. Tr. Vol. 5, p. 865). Petitioners were successful in the primary and faced no opposition in the November General Election.

Respondents were employees of Duval County who "supported" one or more of the incumbents for re-election. The degree and nature of "support" varied among the respondents and, for the most part, was limited to placing a sign in a front yard.[3] In some instances the evidence that a respondent supported an incumbent in any public fashion is vanishingly thin.[4] Respondent Lydia Perez's testimony is most striking on the weak or non-existent nature of the link between termination and political activity:

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3. Respondent Martin testified that he had signs for three candidates but he did not know what offices two of the three were seeking. This lack of knowledge suggests Martin's commitment was thin. The strength of Juan Chavera's commitment is also questionable. Although Chavera testified he supported Saenz and Uresti, Chavera had signs in front of his house for two other candidates but none for Saenz or Uresti and Chavera attended three political rallies for Petitioners. (R. Tr. Vol. 5, pp. 708-709; 714).

4. The Court of Appeals held that Respondents' burden of establishing political affiliation with a losing candidate was slight and could be satisfied by testimony of the losing candidate that an individual supported him without proof that Petitioners knew of the affiliation.

> Q. Now, Ms. Perez, in 1986, did you talk to anybody about the election? Did you campaign for anybody in the election?
>
> A. Not the 1986, no.

(R. Tr. Vol. 1, p. 48)

> Q. And you had nothing to do with the politics of 1986. You didn't campaign for anybody?
>
> A. No. No, not that time. I work but before, in some election, you know. But not that, the 1986.

(R. Tr. Vol. 1, p. 49).

Under Texas law, County government must operate under a balanced budget.[5] When Petitioners assumed office, they were confronted by a bloated, unworkable budget put together in October, 1986, by their predecessors. (R. Tr. Vol. 3, pp. 421-423; 483-484; 518-521). At the time of the 1986-87 budget, the economy of Duval County was in severe decline. In the 1985-86 fiscal year, the value of the property on the County's Tax Rolls was one billion dollars. In the 1986-87 fiscal year the value dropped to $735 million (R. Tr. Vol. 3, p. 524). As a result, tax revenue dropped substantially. (R. Tr. Vol. 3, p. 525).

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5. *See*, Texas Local Government Code §§ 111.001 through 111.010.

The 6.5 million dollar October 1986 budget was based on unrealistic assumptions. The budget assumed collection of $900,000 in delinquent taxes when delinquent tax collections never exceeded $300,000 in a year in the history of Duval County. (R. Tr. Vol. 3, p. 483; Vol. 5, pp. 789; 811). After the budget was adopted and the general order approved, in October 10, 1986, the County Auditor advised the Commissioners Court that the General Order implementing the budget exceeded the budget by $92,000.[6] (R. Tr. Vol. 5, pp. 786-787; 790-794). The Road and Bridge Fund, which was particularly over budget, was used to pay "countywide" personnel. (R. Tr. Vol. 5, pp. 791-794). Although the former commissioners court was aware of the $92,000 deficit in October, 1986, the court had taken no corrective action as of December 31, 1986. (R. Tr. Vol. 5, p. 787).

Thus, when Petitioners assumed office, they faced the task of implementing the reorganization of County government they had promised and dealing with a severe budget short fall. Petitioners immediately implemented their plan to eliminate the Countywide department which resulted

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6. The Court by Appeals Opinion questions the evidence regarding the budgetary crisis in part based on an erroneous understanding of the sequence of events relating to the October 1986 budget warning by County Auditor Hinojosa. The Court of Appeals credits the prior Commissioners Court with dealing with the warning in 1986 "by cutting County employees' salaries 6%". (Opinion, p. 12 fn. 10). In fact, the auditor warned the Commissioners' Court that the general order exceeded the budget by $92,000 *after* the 6% reduction was implemented. Even with the 6% reduction, the general order exceeded the budget by $92,000. No corrective action was taken. (R. Tr. Vol. 5, pp. 786-787; 791-794). The six percent reduction was wholly unconnected to the warning. (R. Tr. Vol 5, p. 801).

in the discharge of Respondents Martin,[7] Davila,[8] Barrera,[9] Ramirez,[10] and Garcia.[11]

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7. Richard Martin began working as a mechanic assigned to the countywide department in March, 1986, shortly before the primary. His position was eliminated as part of the effort to eliminate the Fifth Precinct and return the duties to the Commissioners in January 1987. Each Commissioner had a mechanic on staff, making Martin's position duplicative and unnecessary. (R. Tr. Vol. 2, p. 343; Vol. 4, p. 638). Elimination of countywide allowed the County to get rid of the lease on the building where countywide employees worked. (R. Tr. Vol. 4, p. 632).

8. Respondent Davila was a Civic Center Director. Prior to Respondent's election, Civic Center Directors were under the County Judge. As part of the re-organization, responsibility for the Civic Center was transferred to the individual commissioners and the position of Civic Center Director was eliminated. (R. Tr. Vol. 2, pp. 337-340). Respondents Perez and Alaniz also worked in the Civic Centers. Their positions were eliminated as part of dealing with the budget shortfall.

9. Juan Barrera began working for Duval County as part of the countywide department in January 1985. (R. Tr. Vol. 1, p. 126). Barrera was assigned to the Macho Creek Project, a short term special project, as an inspector November 1, 1986. (R. Tr. Vol. 1, p. 125). Barrera was discharged January, 1987 as part of the elimination of countywide. (R. Tr. Vol. 3, p. 437). Antonia Perez also was assigned to the Macho Creek Project. Her position was eliminated as the project approached completion.

10. Juan Ramirez was a heavy equipment operator assigned to sanitation work for Countywide. His position was eliminated when Countywide was eliminated and each precinct took over responsibility for its own landfill with existing employees. (R. Tr. Vol. 4, p. 631).

11. In January 1987, Salvador Garcia was assigned to work at the gate at the landfill. (R. Tr. Vol. 4, p. 647). Salvador Garcia was unable to perform heavy duties. His duties regarding the gate did not require a full time employee and could be performed by other personnel on an as necessary basis. For that reason, Salvador Garcia's position was eliminated. (R. Tr. Vol. 2, pp. 267-268).

Petitioners further acted to consolidate positions[12] and to relieve overstaffing.[13] As a result of Petitioners' efforts, the number of Duval County employees dropped from 314 at the beginning of January, 1987, to 264 in

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12. The treatment of the position of PBX Operator provides an example of consolidation. In January 1987, Duval County had a PBX Operator (Respondent Sylvia Saenz) and an assistant PBX Operator (Theresa Briones). As PBX Operator, Saenz's "duty was to answer the telephone, transfer calls and that was all, for the whole county." (R. Tr. Vol. 1, p. 4). In January 1987, Saenz was unable to answer the telephone due to cosmetic surgery on her jaw. (R. Tr. Vol. 1, p. 8). Saenz returned to work right after surgery because she did not want to be terminated due to absence. She was unable to talk for 15 to 16 days prior to termination. (R. Tr. Vol. 1, p. 17) and, in fact, could not talk for two months. (R. Tr. Vol. 1, p. 34). Instead Theresa Briones answered the telephone. The positions of PBX Operator and Assistant Operator were consolidated. Theresa Briones, the Assistant PBX Operator and a supporter of former Judge Uresti, was assigned responsibility for the PBX. (R. Tr. Vol. 3, p. 490).

13. The treatment of courthouse janitorial positions provides an example of correction of overstaffing. Two Respondents worked as courthouse janitors, Elipido De La Garza and Oralia Arredondo. In January, 1987, Duval County had 11 janitors working at the courthouse. At the time of trial, the number had been reduced to 5 or 6. (R. Tr. Vol. 3, pp. 429, 433; Vol. 4, pp. 695-696). Both De La Garza and Arredondo were terminated. At the time of trial, De La Garza was 74 years old. Respondent Garcia testified De La Garza "wasn't doing a very good job..." and engaged in illegal gambling during working hours. (R. Tr. Vol. p. 432). De La Garza would go into the office and ask the employees if they wanted to bet on baseball games or basketball games or football games. (R. Tr. Vol., p. 432). De La Garza admitted that while working he would sell chances on games and that he had been doing so for ten years. (R. Tr. Vol. 4, pp. 692-699). Arredondo was the last janitor hired. (R. Tr. Vol. 3, p. 430). Arredondo began working as a substitute janitor in May, 1986. (R. Tr. Vol. 1, p. 161). On December 30, 1986, one day before the change in administration, she was hired on a temporary basis to replace another employee during a leave of absence. Arredondo's employment was not to exceed six months. (Pl. Ex. 55; R. Tr. Vol. p. 163).

February and 251 in September. The monthly payroll dropped from approximately $272,000.00 in January to approximately 255,000.00 in September. At trial Respondents complained that they were discharged in order to make room for replacements who supported Petitioners. Respondents framed their case as a classic patronage dismissal case. The evidence at trial established that, with few exceptions, Respondents were not replaced during the budget year. The Fifth Circuit did not examine the individual circumstances of each Respondent to determine whether the individual had been replaced but largely focused on Respondents as a group. The Fifth Circuit suggests that, even when a position is eliminated, patronage may not be a factor in the decision of which employees to keep and which to layoff. "Even for positions that the new commissioners clearly eliminated, the evidence still raises an issue of whether patronage motivated the choice of which employees to dismiss and which to retain or transfer to other positions." (Fifth Circuit Opinion, p. 9).

B. Proceedings Below

On February 5, 1987, Respondents filed "Plaintiff's Original Complaint" in which Respondent alleged their rights under the First, Fifth and Fourteenth Amendments to the United States Constitution had been violated when their County employment was terminated. Respondents alleged that "[b]ut for their having voted against the Defendant candidates and having associated with political opponents of the Defendant candidates, the Plaintiffs would not have had their employment terminated with Defendant County." Respondents asserted jurisdiction under several statutes including 28 U.S.C. §§ 1331 and 1343 (a)(1)(2)(3) and (4).

Following a jury trial, Petitioners moved for new trial and judgment n.o.v. Both motions were denied. On March

25, 1991, Judgment was entered for Plaintiffs. Petitioners perfected a timely appeal to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals affirmed as modified the judgment of district court on July 1, 1992.

Because the Fifth Circuit's Opinion contravened an earlier *en banc* decision of the Fifth Circuit and imposed an impossible burden on Petitioners in asserting their budgetary defense, Petitioners sought rehearing *en banc* from the Fifth Circuit. Rehearing was denied August 12, 1992.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's decision conditioning an elected official's ability to fulfill a campaign commitment overwhelmingly approved by the voters on the official's motive in making the commitment deprives the voters of the right to structure their representative government. Requiring the courts at the request of disappointed opponents to second guess the motive of a political candidate in making and fulfilling a campaign promise is contrary to basic democratic principles in which the wisdom of a campaign promise is determined by the will of the voters. It intrudes the courts into the political arena to a degree inconsistent with the constitution and this Court's decisions.

The potential damage to the political process inherent in allowing former employees to subject each political decision to reorganize a governmental agency, implement a reduction in force, or shift resources from one program to another to a "motives" litmus test is enormous. This Court should grant certiorari to reaffirm the voters' right to structure their government and to provide guidance to the Courts of Appeals and elected officials on the degree to which an elected official's motive in making and keeping a

campaign commitment is subject to judicial scrutiny.

I. THE FIFTH CIRCUIT COURT OF APPEALS' DECISION IS AN UNWARRANTED EXPANSION OF THIS COURT'S PATRONAGE DISMISSAL CASES.

A. The Fifth Circuit's decision is inconsistent with this Court's recognition of the substantial interest of government in carrying out policies which the electorate has sanctioned.

The issue before the Court in *Elrod*[14], *Branti*[15], and *Rutan*[16] was narrow: Whether employee termination decisions based *solely* on political affiliation were permissible. In *Elrod*, the Court framed the issue as whether public employees could be discharged "solely because of their partisan political affiliation". 427 U.S. at 348. In *Branti*, the Court again addressed a case in which the decision to terminate respondents rested "upon the sole grounds of their political beliefs." 445 U.S. at 509. *Elrod*, *Branti* and *Rutan* did not directly raise the issue in this case: Whether an elected official may be precluded from carrying out a campaign commitment overwhelmingly approved by the voters because the official's motive in making the

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14. *Elrod v. Burns*, 427 U.S. 347 (1976).

15. *Branti v. Finkel*, 445 U.S. 507 (1990).

16. *Rutan v. Republican Party*, 497 U.S. 62 (1990).

commitment was, in part, political self interest.[17] Although the Court did not confront a situation raising the issue of employee discharges in the context of implementation of voter mandated reforms in *Elrod*, *Branti* and *Rutan*, the Court provided guidance on the importance of giving effect to voter sanctioned policies. The Court found that the public interest in insuring that representative government "not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate," was a sufficient justification for patronage dismissals of policy making positions. *Elrod*, 427 U.S. at 368. The Court observed that "[t]here is also need to insure that policies which the electorate has sanctioned are effectively implemented." 427 U.S. at 372. The electorate's sanction of a policy in itself provides a reason for implementation absent a clear constitutional infirmity such as invidious discrimination. The voters' right to implement structural change in government makes examination of the motives of the elected officials in voting for the structural change an inappropriate judicial intrusion into the political process.[18]

The Fifth Circuit's Opinion expands the principles of *Elrod* to include discharges made as part of a voter sanctioned reorganization. The Fifth Circuit conditions implementation of voter approved reorganization on an examination of elected officials' motivation in carrying out

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17. Another way of framing the issue is: Must the mandate of the voters for reform be disregarded because the candidate calling for reform may have been influenced by a political desire to weaken the power base of his opponent.

18. For reasons of comity between branches of government and out of respect for the political process, the Courts "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive". *See United States v. O'Brien*, 391 U.S. 367, 383 (1968).

campaign promises.

The central theme of Petitioners' campaign was a promise to eliminate the fifth precinct. The Court of Appeals' opinion acknowledges that elimination of the fifth precinct was a central campaign issue and that Petitioners acted to fulfill their campaign commitment. As the Court of Appeals' Opinion states:

> The democratic primary election of 1986, which came at a time of shrinking county tax resources, caused in party by the decline in oil and gas property values, generated intense community interest.
>
> Judge Garcia, along with Commissioners Lee and Flores, challenged incumbent Judge Gilbert Uresti and Commissioners Carolina Saenz and Sonny Widerkehr in that primary. *The challengers ran on a ticket stressing county reorganization and budget reform, and promising elimination of the so-called "fifth precinct."* The fifth precinct was a budget category encompassing "countywide" road and bridge maintenance equipment and personnel whose responsibilities overlapped those of the county's four territorial precincts. Garcia, Lee and Flores won in the democratic primary.

(Opinion, p. 2) (Emphasis added).

The Court of Appeals gives no weight to these uncontested facts. Instead, the Court of Appeals holds that viability of the campaign promise defense turns on "factual

questions" of motive and causation that are suited for the trier of fact. Inviting the jury to second guess the motive of a political candidate in making and fulfilling a campaign promise is contrary to basic democratic principles in which the wisdom of a campaign promise is determined by the will of the voters. It intrudes the courts into the political arena.

It is also one sided and invites disruptive litigation whenever reform is attempted pursuant to a clear campaign promise. When a candidate adopts a "throw the rascals out" platform targeting an individual for discharge or a government department or program for elimination, the individual or individuals whose employment is threatened may well become active in the campaign on behalf of opposition candidates because their "job[s] would be in jeopardy."[19] To paraphrase the concurring opinion in *Kinsey*, such individuals should not "secure job tenure under the First Amendment by publicly espousing [their] antagonizing philosophy or by engaging in other political activity in its service." 950 F.2d at 998. Such individuals should not be permitted to block voter mandated reform by the expedient of becoming closely identified with the losing party.

In this case, the undisputed evidence is that Petitioners were motivated to campaign against the fifth

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19. Self interest is a common motive in determining political support. *See, e.g., Kinsey v. Salado I.S.D.*, 950 F.2d 988 (5th Cir.), *cert. denied*, __U.S.__, 112 S. Ct. 2275 (1992). In *Kinsey*, Plaintiff, as the Superintendent of the district, became the central issue of the campaign. Plaintiff campaigned for the losing candidates and shortly after the election had his contract bought out. Due to Plaintiff's confidential/policy making position, the campaign promise issue was not fully developed in *Kinsey*. However, there is nothing in *Kinsey* to suggest that the defendant's motive in making Kinsey's performance a campaign issue would in any way be relevant.

precinct based on their belief it was a wasteful source of patronage--a place to put people. In effect, Petitioners campaigned against the patronage practices of their predecessors.[20] The Fifth Circuit's opinion takes the ironic position Petitioners cannot fulfill their promise by eliminating the vestiges of prior patronage because a jury could find Petitioners were motivated, in part, by partisan political concerns.

By definition, campaign promises are motivated by partisan political concern. This fact does not provide a basis for ignoring the mandate of the voters for specific reforms. If, as here, the reform is not inherently unconstitutional, the fact that the candidate proposing the reform did so to gain political advantage does not justify the court in striping the voters of the right to decide the structure of their government, which is the effect of the Fifth Circuit's opinion.

B. In evaluating Petitioners' assertion of budgetary justification for terminating Respondents' employment, the Court of Appeals utilized an improper standard of review.

In rejecting Petitioners' assertion that the terminations were necessary to resolve a severe budgetary shortfall, the Fifth Circuit utilizes an impossible standard.

> Unlike the court in *Pilarowski v. Macomb Health Department*, 841 F.2d 1281, 1284 (6th

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20. In effect, employees of the "fifth precinct" are "beneficiaries of a patronage system" who should not be heard to complain when the system is dismantled. *See Elrod v. Burns*, 427 U.S. 381 (1976) (dissenting opinion).

> Cir.), *cert. denied*, 109 S. Ct. 133 (1988), we are not faced with uncontradicted evidence that budget constraints confronting the Commissioners Court in January, 1986 were as severe as the Defendants allege, or *that substantial personnel cut backs were the only satisfactory means of easing those constraints.*

(Opinion, p. 12).

Establishing a requirement that proof of a budget defense in a First Amendment case requires proof "that substantial personnel cutbacks were the *only* satisfactory means of easing those constraints" imposes an impossible burden on Petitioners and is inconsistent with this Court's precedents. The budgetary process involves choices among competing priorities. It is by its very nature a political process involving compromise.

In an era of difficult economic conditions, many governmental bodies are faced with reducing governmental spending. The reality of too many needs and too little money simply does not permit a ready solution that is "*the only satisfactory*" conclusion. The decision whether to reduce government services, employee benefits, increase taxes, or to implement a reduction in force involves a complex balancing of competing interests. That balancing may be hamstrung if the governmental body must stand ready to prove that "substantial personnel cutbacks were the only satisfactory means" of dealing with a budget shortfall when faced with a Civil Rights claim by an individual terminated as part of a reduction in force or elimination of a particular department. Such a standard provides no guidance and fails to recognize that no single solution may be satisfactory to all those affected by it. It further makes immediate the danger identified by the dissent in *Rutan* that elected officials will

avoid the difficult decisions necessary to efficient operation of government in order to avoid potential personal liability for ruinous damages:

> [U]nless the government is fairly sure that dismissal is permitted, it will leave, the politically uncongenial official in place, since an incorrect decision will expose it to lengthy litigation and a large damage award, perhaps even against the responsible officials personally.

Rutan v. Republican Party, supra.

Petitioners established that their decisions in dealing with budgetary problems were reasonable and responsible.[21] No more should be required. *See, Public Workers v. Mitchell*, 330 U.S. 75 (1947); *Brown v. Glines*, 444 U.S. 348 (1980); *Compare, Pickering v. Board of Education*, 391 U.S. 563 (1968).

II. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE FOURTH AND SEVENTH CIRCUIT.

Although their analysis varies, the Fourth and Seventh Circuits have insulated budgetary decisions eliminating governmental positions from judicial review. In *Raterre v.*

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21. The "solution" to the budget shortfall urged by Respondents at trial was elimination of garbage pick up in the cities and transfer of sanitation responsibility to the individual cities. This "solution" would itself involve termination of a number of employees including some of the Respondents. Commissioner Lee explained that the "solution" was unworkable because many of the cities did not have a tax base that would permit them to provide sanitation services.

Rockett, 852 F.2d 946 (7th Cir. 1988), the Seventh Circuit characterized actions by city commissioners in twice approving budget decisions to eliminate jobs of specific individuals as legislative actions entitling the commissioners to absolute immunity in an action brought under 42 U.S.C. § 1983 by former city employees who claimed that the adverse budget action was politically motivated. In *Hollyday v. Rainz*, 964 F.2d 1441 (4th Cir. 1982) the Fourth Circuit also relied on legislative immunity to insulate a governmental entity from a 1983 challenge of a decision to eliminate a budget position. *Compare, Baker v. Mayor of Baltimore*, 894 F.2d 679 (4th Cir.), *cert. denied* __U.S.__, 111 S. Ct. 56 (1990).

Perhaps the most cogent analysis for refusing to look behind the facial validity of a budget action by a local government to examine the underlying motives of the elected officials is provided by the Seventh Circuit in *Fraternal Order of Police Lodge v. City of Hobart*, 864 F.2d 551 (7th Cir. 1988). The Seventh Circuit starts with the principle that courts "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislation motive". The Seventh Circuit attributes this principle to "respect for the political process and on simple comity between departments of government." 864 F.2d at 554. The Seventh Circuit wisely acknowledges the inherently political nature of the political process and cogently argues that attempting to remove politics from the political process damages the process.

> The political process is impaired when legislators are forbidden to favor their supporters and disfavor their opponents. For that, after all, is politics, or rather an important part of politics. Politics is not merely, or even primarily, the disinterested

> pursuit of the public interest. It is a power struggle...The First Amendment does not forbid the characteristic operation and outcome of representative government. It does not outlaw the interest-group state; it does not purge politics from politics...
>
> A pragmatic ground for rejecting the principle urged by the plaintiffs is that its acceptance would put at hazard a vast amount of routine legislation--federal, state, and local. Legislation passed by lame-duck legislatures, legislation passed by newly elected legislators--all would be subject to invalidation by a federal court upon evidence that the legislation, though on its face concerned only with the most ordinary matters of governmental administration, had actually been intended to punish the legislators' political opponents, or reward the legislators' friends with largesse obtained by taxes on their enemies...The expansion of judicial review of legislation would be breathtaking...

864 F.2d at 554.

The Fifth Circuit attempts to eliminate politics from the political process. Under the Fifth Circuit's analysis, it is not enough that elected officials act to carry out reform mandated by the voters, the elected officials' motives must be above reproach. Such a standard is unrealistic and inconsistent with the democratic process of government.

CONCLUSION

For the foregoing reasons stated above, Petitioners, the County of Duval, Texas, the Commissioners Court of Duval County, Texas, Frank J. Garcia, former County Judge, Commissioners Bob Lee, Alejo Garcia and Richard Barton and former Commissioner Sigifredo Flores, request this Court to issue a Writ of Certiorari to review the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

J.A. CANALES
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Attorneys for Petitioners

September 28, 1992

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

COUNTY OF DUVAL, ET AL,
Petitioners,

v.

ANTONIA PEREZ, ET AL,
Respondents.

CERTIFICATE OF SERVICE

I, J. A. Canales, a member of the Bar of the Supreme Court of the United States and counsel of record for County of Duval, Texas, The Commissioners Court of Duval County, Texas, Frank J. Garcia, former County Judge, Commissioners Bob Lee, Alejo Garcia and Richard Barton and former Commissioner Sigifredo Flores, Petitioners herein, hereby certify that on September 28, 1992, pursuant to Rule 33, Rules of the Supreme Court, I served copies of the foregoing Petition for a Writ of Certiorari on Respondents herein, as follows:

On September 28, 1992, Antonia B. Perez, Pablo Chavera, Elipidio De La Garza, Jesus Salazar, Juan Ramirez, Juan H. Barrera, Salvado S. Garcia, Sylvia L. Saenz, Lydia C. Perez, Diamantina Davila, Cecilio Alaniz,

Oralia Arredondo and Richard D. Martin, Respondents herein, by depositing such copies in the United States Post Office, Corpus Christi, Texas, with first class postage prepaid, properly addressed to the post office address of Mr. Peter Torres, Counsel of Record for Respondents, at THE LAW OFFICES OF PETER TORRES, JR., 1815 San Pedro Avenue, San Antonio, Texas 78212-3642.

All parties required to be served have been served.

Dated September 28, 1992.

J.A. CANALES
(Counsel of Record)
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Attorneys for Petitioners

APPENDIX A

U.S. COURT OF APPEALS
FILED
JUL 01 1992
GILBERT F. GANUCHEAU
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2387

ELIA J. GARCIA, ET AL.,
Plaintiffs-Appellees,

versus

THE COUNTY OF DUVAL, TEXAS, ET AL.,
Defendants-Appellants

Appeal from the United States District Count for
the Southern District of Texas
(CA C-87-17)

Before SNEED[1], REAVLEY AND BARKSDALE, Circuit Judges.

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[1]Senior Circuit Judge of the Ninth Circuit, sitting by designation.

REAVLEY, Circuit Judge:[2]

Defendants Duval County, County Judge Frank Garcia, and County Commissioners Robert Lee, Sigifredo Flores, Alejo Garcia and Richard Barton appeal from judgment entered upon a jury's finding that they violated the plaintiffs' First Amendment rights by terminating their employment. Defendants contend that the evidence presented at trial does not support the jury's findings. We modify the judgment, and affirm.

I. BACKGROUND

Duval County is a community of fervent political interest and activity. The county's three largest employers are the county itself, the public schools, and the water district. The county hires salaried employees on a monthly payroll basis, and contracts with others for their labor. Political patronage historically has played a large part in county politics. Voting in county elections is heavy. The democratic primary election of 1986, which came at a time of shrinking county tax resources, caused in part by the decline in oil and gas property values, generated intense community interest.

Judge Garcia, along with Commissioners Lee and Flores, challenged incumbent Judge Gilbert Uresti and Commissioners Carolina Saenz and Sonny Widerkehr in that primary. The challengers ran on a ticket stressing county reorganization and budget reform, and promising elimination

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[2]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

of the so-called "fifth precinct." The fifth precinct was a budget category encompassing "countywide" road and bridge maintenance equipment and personnel whose responsibilities overlapped those of the county's four territorial precincts. Garcia, Lee, and Flores won in the democratic primary.

The challengers easily prevailed in the November election, and assumed control of a voting majority on the five-member commissioners court. Within days after Garcia, Flores, and Lee took office in January 1987, the newly-constituted court reorganized county departments, eliminated several employment positions, and created new positions. By unanimous vote, the court dismissed 46 employees, including the plaintiffs, and hired others. The county had not given any plaintiff a performance evaluation prior to dismissal, and did not interview any plaintiff for a newly-created position. The plaintiffs had supported the primary campaigns of one or more of the incumbents.[3]

The plaintiffs sued Duval County and the individual defendants under 42 U.S.C. §1983, complaining that they were dismissed because of their political activities. The case was tried to a jury, which found for the plaintiffs on their First Amendment claims, and further found that the defendants had acted with malice. The district court denied motions for new trial and for judgment notwithstanding the verdict submitted by the individual defendants and the county, and entered judgment against them jointly and

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[3]The testimony established that Diamantina Davila, Juan Barrera, Oralia Arredondo, Cecilio Alaniz, Richard Martin, Juan Ramirez, Salvador Garcia, and Elpidio de la Garza supported Judge Uresti's campaign. Sylvia Saenz, Lydia Perez, Antonia Perez, Luis Martinez, Jesus Salazar, and Pablo Chavera supported the campaigns of both Judge Uresti and Commissioner Saenz. The court granted a directed verdict as to Lydia Trevino and Janie Ruiz after finding them to be confidential employees.

severally. Defendants appeal the judgment and the district court's order denying their motion for new trial.

II. DISCUSSION

Facing judgment for both compensatory and punitive damages, defendants now contend that the evidence does not support the jury's findings that plaintiffs' political expression was a but-for cause of, and a substantial motivating factor behind, their dismissal; that the evidence did not support the amount of compensatory damages awarded; and that the evidence did not support a finding of malice. Defendants also maintain that the district court's instructions confused the jury and that the district court abused its discretion in allowing certain witnesses to testify. We discuss each of these arguments.

A. EVIDENCE SUFFICIENCY

1. *The Burden*

We affirm the jury's verdict if the state of all the evidence presented at trial, when considered in the light most favorable to the plaintiffs, is such that reasonable jurors might reach different conclusions on the matters in issue. *Liberty Mutual Ins. Co. v. Falgoust*, 386 F.2d 248, 252 (5th Cir. 1967). We do not weigh conflicting evidence or assess witness credibility. *Id.* at 253. The jury's damages award will stand unless entirely disproportionate to the injury. *Caldarera v. Eastern Airlines, Inc.*, 705 F.2d 778 (5th Cir. 1983).

In order to prevail on their section 1983 claim, the plaintiffs had to prove that they engaged in political activities on behalf of a losing candidate, and that those activities were

a substantial or motivating factor behind the defendants' decision to dismiss them. *Mt. Healthy City School Dist. Ed. of Education v. Doyle*, 97 S.Ct. 568, 575-76 (1977). Circumstantial evidence ordinarily carries plaintiff's burden in a retaliatory dismissal case because often that is the only possible evidence of the employer's motivation. *Allaire v. Rogers*, 658 F.2d 1055, 1059 (5th Cir. 1981).

Once plaintiffs make a *prima facie* showing that an impermissible reason motivated their dismissal, defendants may still prevail by proving that they would have dismissed plaintiffs regardless of their participation in protected activity. *Doyle*, 97 S.Ct. 568, 575-76; *Barrett v. Thomas*, 649 F.2d 1193 (5th Cir. 1981), *cert denied*, 102 S.Ct. 1992 (1982). But "the mere assertion or demonstration that legitimate reasons existed for adverse action is not enough to satisfy the employer's burden of proof." *North Mississippi Communications, Inc. v. Jones*, 874 F.2d 1064, 1069 (5th Cir. 1989). Defendants must, in other words, establish that activity protected under the First Amendment was not a "but for" cause of dismissal. *Id.*

The defendants argue that the evidence concerning job elimination and employee replacement disposes of the motivation issue in this case. We find no authority that has imposed on a dismissed plaintiff the burden to prove replacement by a member of the political in-group. Plaintiffs bear the burden of proving only that an impermissible reason was a substantial or motivating factor. Job elimination and employee replacement evidence, while relevant to defendants' defense at trial, does not alter the plaintiffs' burden.

2. *The Evidence of Motivation*

The defendants contended below that evidence

pertaining to plaintiffs Davila and Perez did not prove political expression. But the district court found that all of the plaintiffs' activities were protected. Judge Uresti's uncontradicted testimony that Davila and Perez at least supported him establishes their affiliation. And the plaintiffs offered testimony to show that the affiliation of any individual is widely known in the Duval County political community. So, according to *Elrod v. Burns* 96 S.Ct. 2673 (1976), the district court's determination that Davila and Perez were not confidential or policymaking employees ends the inquiry as to defendants' liability to them. And if Davila and Perez engaged in political expression, we think that the evidence supports a finding that defendants dismissed them because of that expression and would not have dismissed them otherwise.

Judge Garcia testified that the new administration retained several employees who, to his recollection, supported Uresti. But the jury could have disbelieved that testimony. Those employees did not testify, and Judge Uresti's testimony put their campaign activity in question. Judge Garcia's testimony, that he, Flores, and Lee did not meet as a group before their first official meeting in January 1987, may have undermined his credibility because Commissioners Lee, Barton and Alejo Garcia testified that Garcia met with them at least twice in November or December 1986, and that they discussed the county budget and reorganization during one of these meetins. There is no evidence tending to show that any dismissed employee supported Garcia, Flores, or Lee, or that any newly-hired employee supported an incumbent.

Defendants also say that Commissioner Lee did not terminate all employees in his precinct after he took office, and that "virtually all" of the precinct's employees supported Lee's opponent. But Commissioner Lee supplied the only

testimony to this effect, which was somewhat less than firm testimony,[4] and Judge Uresti contradicted it.[5] Lee also testified that he fired one plaintiff who supported Uresti, and hired two employees, one of whom campaigned for the Garcia faction.

Defendants cite other evidence tending to show that the county did not replace the plaintiffs with the defendants' supporters, and urge that this evidence negates any inference of retaliatory motive. But the plaintiffs cite conflicting testimony from which the jury could find that some plaintiffs were in fact replaced by the defendants' supporters,[6] and that the plaintiffs' dismissals were matched by the creation of different job titles for those supporters.[7] There also is

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[4]When asked what percentage of his precinct's employees supported the Uresti faction, Lee testified "I think virtually all of them did. As far as I know, there were none of them out campaigning or supporting me."

[5]Uresti "wonder[ed] how I lost the election." He testified that several county offices and specific employees did not support him.

[6]The commissioners court dismissed Uresti supporters Antonia Perez, Pablo Chavera, Sylvia Saenz, and Lydia Perez. Chavers and Saenz testified that the commissioners court replaced them with supporters of the Garcia faction. Perez testified that J. P. Barton replaced her. Barton's political affiliation was not established, other than by inference from testimony that he is a relative of Commissioner Richard Barton.

[7]Commissioner Flores testified that the commissioners dismissed civic center director Diamantina Davila because "we got rid of the civic center directors." But plaintiffs brought contradictory testimony concerning the fate of two other civic center directors, Dora Samaniego and Roque Salas. Although the new commissioners officially abolished the civic center positions occupied by Salas and Samaniego, they transferred Samaniego to other duties within the county, and elevated Salas to the newly-created position of civic center coordinator in Commissioner Flores' precinct. The commissioners hired Lupita Silva in a new position as Salas' secretary. But they fired Davila. Judge Uresti testified that

conflicting evidence whether other jobs or job duties were in fact eliminated, as the defendants testified. This issue could not be resolved directly from county records because of the county's practice of hiring off-payroll contract labor.[8] From testimony concerning, *inter alia*, personnel changes in the civic centers and in Commissioner Flores' precinct, the jury could have inferred that the commissioners merely shifted job responsibilities to different positions and retained favored individuals in those positions. By discrediting defense testimony, the jury could even have inferred that the new commissioners brought about a net increase in county employment that was not reflected in the payroll figures because of the county's use of contract labor. Even for positions that the new commissioners clearly eliminated, the evidence still raises an issue of whether patronage motivated the choice of which employees to dismiss and which to retain or transfer to other positions.

Defendants also point out that the plaintiffs brought no evidence of a pattern of politically-motivated threats or coercion from the defendants during the primary election campaign. All but one of the plaintiffs testified that they had no contact with any of the defendants concerning politics, and received no political threat or warning from any defendant. Pablo Chavera, however, testified that candidate

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Davila very actively supported his campaign, that Samaniego did not support his campaign, and Salas actively supported Judge Garcia. Silva worked for the Flores campaign.

[8]Commissioner Flores testified that in January 1987, the new commissioners court dismissed 46 employees, hired 38 salaried employees, and retained 35 contract laborers of whom 23 worked a few weeks on a grant-funded project. County Auditor Octavio Hinojosa testified that the county retained about 43 contract laborers in May of 1987. But Hinojosa did not know the total sum that the county spent on contract employees in 1987, and no one else testified to this amount.

Flores told Chavera "if we weren't going to vote for him he was going to lay us off." Defendants argue that we should reject Chavera's testimony under *Tanner v. McCall*, 625 F.2d 1183 (5th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981). But that case stands for the rudimentary proposition that where intent is disputed, courts should consider all of the circumstances raised by the evidence in interpreting officials' remarks in section 1983 cases.

Defendants argue that Commissioner Flores' remark to Chavera, even if it occurred, is entitled to no weight against the other defendants because no evidence links the remark to them.[9] Defendants rely on *Clark v. Falls*, 890 F.2d 611 (3rd Cir. 1983) to support this argument. But Clark involved the weight to be afforded a single statement that supplied the only strand of proof holding together an otherwise implausible story. *Id.* at 622. This case presents considerable circumstantial evidence of the defendants' retaliatory motivation.

3. *The Evidence of Causation*

Defendants argue that a budget crisis, caused by the spending policies of Judge Uresti and the defeated

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[9]Although Texas law prohibits commissioners from influencing the personnel decisions of other elected officials, the members of the commissioners court nevertheless vote as a body on the dismissal and hiring of each county employee. Perhaps the jury considered Chavera's testimony relevant to the county, because Flores is a voting member and representative of that body. And perhaps the jury also considered his testimony at least marginally relevant to the intent of Judge Garcia and the other commissioners. Garcia, Flores, and Lee met before taking office to discuss reorganization. All commissioners consistently and unanimously voted to dismiss the plaintiffs, and Judge Garcia signed the orders. And the two holdover commissioners testified that they had decided not to question the dismissal of so many Uresti supporters.

commissioners, compelled the plaintiffs' dismissals, and therefore political animus could not have been the but-for cause of those dismissals. Defendants contend that elimination of countywide employees was necessitated by the legal requirement of a balanced budget, and by defendants' political obligation to fulfill their campaign promise to eliminate budget excess, such as the "countywide" department. Defendants say that they could not be responsible, any more than the voting public, for the fact that Uresti supporters congregated in those countywide positions.

We reject the defendants' contention that termination of countywide precinct employees was merely the fulfillment of a campaign promise and not evidence of retaliatory intent. While it is true that fulfillment of a campaign promise, without more, does not prove retaliatory intent, it is also true that the defendants were not entitled to use campaign promises to cover their purpose to punish political opposition. As with the defendants' budget crisis defense, their campaign promise defense implicates factual questions of motive and causation that are suited for the trier of fact. For reasons that we have stated, we do not find the evidence of impermissible motive so insubstantial as to justify upsetting the verdict.

Defendants also survey evidence indicating that the county faced a budget crisis precipitated by declining property values, an anticipated revenue shortfall, and excessive personnel budgets. The amount of delinquent taxes owed to the county was sizeable, however, and the testimony at trial disputed both the total amount due and the estimated amount collectable in the upcoming year. Plaintiffs attempted to show the pretextual nature of the budget crisis defense by bringing evidence that the new county court made budget cuts without the benefit of any official report about the status of delinquent tax collections and failed to enact

alternative money-saving measures that might have forestalled layoffs. Plaintiffs also brought testimony, which we have discussed, to the effect that defendants did not in fact reduce the personnel budget.[10] Unlike the court in *Pilarowski v. Macomb County Health Department*, 841 F.2d 1281, 1284 (6th Cir.), *cert. denied*, 109 S.Ct. 133 (1988), we are not faced with uncontradicted evidence that budget constraints confronting the commissioners court in January 1986 were as severe as the defendants allege, or that substantial personnel cutbacks were the only satisfactory means of easing those constraints.

4. *Compensatory Damages*

Defendants urge that the jury's award of damages was excessive, and bore little or no relationship to the individual

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[10]County Auditor Hinojosa testified that the county payroll in September 1987 was approximately $255,000 per month, compared with the last three months of 1986 when the average monthly payroll was $295,000. He also testified that the county employed 314 people in January 1987, but only 251 in the following September. Hinojosa stated that his employee list did not include contract labor, however, and that he did not know how much money was spent on contract labor in 1987. No one testified to this amount.

We think that there is another reason why the jury would have been entitled to question the significance of evidence concerning budget and personnel reductions in the latter part of 1987. The testimony showed that the commissioners court under Judge Uresti responded to an October 1986 deficit warning from Hinojosa by cutting county employees' salaries 6%. Judge Garcia testified that he nevertheless remained concerned about future budget difficulty. However, the evidence shows that no official warning of such difficulty came until Hinojosa advised the court in March 1987 of a second impending shortfall that dwarfed October's deficit figure. So the jury could have believed that the commissioners court did not reduce the total personnel budget until after that March warning, whereas the plaintiffs had been dismissed in January 1987.

plaintiffs' damages testimony. The district court instructed the jury to return a single sum in damages reflecting all of plaintiffs' claims, including back pay and lost retirement or other benefits (less any amounts that plaintiffs reasonably could have earned), injury to reputation and character, and mental anguish and emotional distress.

Defendants do not challenge the plaintiffs' entitlement to all of the damages elements set out in the court's instructions. Rather, defendants complain that the amounts are not sufficiently closely related to testimony regarding plaintiffs' lost wages. But plaintiffs testified not only about their lost wages, but also about their subjective emotional upheaval, worry, and stress following their dismissals. Except for one instance, we find no indication that plaintiffs' damages were excessive in light of the fact that most of the plaintiffs testified that they had families, lost insurance benefits, worried about finances, and felt constrained to attempt to seek employment outside Duval County. The jury reasonable could have awarded amounts for mental anguish and emotional distress in excess of lost wages.

We do think, however, that the jury's award of $8900 in damages to Salvador Garcia was excessive. Garcia testified that he lost $800 in wages. The order of the commissioners court setting salaries effective October 1, 1986 indicates that Garcia earned $901.25 per month. The plaintiffs' counsel waived Garcia's claim for mental anguish in order to avoid opening the door to testimony regarding his pending indictment. Garcia offered no testimony of other damages, including lost employee benefits. Finding no evidentiary basis for the jury's amount, we modify the judgment to provide for an award of $901.25 in damages to Salvador Garcia.

4. *The Evidence of Malice*

Section 1983 allows punitive damages upon proof of the defendants' wanton or malicious conduct or malicious intent. *Thompkins v. Belt*, 828 F.2d 298, 301 (5th Cir. 1987). The defendants argue that the evidence makes out no such proof, but rather establishes only that they acted in good faith motivated by budgetary concern. They reiterate their contention that they retained many Uresti supporters in county employment, and had no political conversation with any of the plaintiffs during the campaign, facts which are inconsistent with political animus.

The jury apparently discredited the appellants' budget crisis defense, and found that the plaintiffs' dismissals were politically motivated. We think that the evidence also raised an issue of malicious intent from which a reasonable jury could have reached the result in this case. Plaintiffs cite testimony concerning county officials' remarks to certain plaintiffs that were harsh enough to support a malicious intent finding.

Several plaintiffs, including Antonia Perez and Oralia Arredondo, testified that Judge Garcia's secretary told them, without any explanation, that they were fired. Juan Barrera did not discover he had been terminated until he appeared for work January 16 to discover that his time card was missing. One of Judge Garcia's secretaries simply told Barrera that he was fired. Sylvia Saenz, a PBX operator and a county employee of seven-years, underwent surgery and had her jaw wired shut at the time Judge Garcia took office. Saenz testified that Judge Garcia told her, "if you can't do your job, we're going to do something about it." Garcia's secretary later told Saenz that her position had been eliminated.

Luis Martinez, a precinct foreman, testified that Commissioner Flores told him that "that damn woman didn't left no money" so Flores had to let him go. But Flores quickly replaced him with Ramon Guerra and also hired a secretary in a newly created position. Cecilio Alaniz, an 80 year old county janitor, initially was unable to find out if he still had a job after the January 15 dismissals. He reached Judge Garcia by telephone on Monday January 16th, late on the afternoon after working that day, and asked if he still had a job. Judge Garcia told him "everybody knows except you."

The plaintiffs cite evidence of other conduct from which the jury reasonable could have found wantonness or malice. The county dismissed most plaintiffs summarily without explanation or warning. Janie Ruiz arrived at work on January 5th to discover that the lock on her office was being changed. One hour later, Commissioner Lee told her she was terminated. Ninfa Chavera, who was not a plaintiff, showed up for work at the County Treasurer's Office on January 5th to discover that the locks had been changed and her replacement was sitting at her desk. The treasurer told her she was dismissed. Later that morning the new commissioners court met and voted her dismissal. The plaintiffs' dismissals followed within days after Judge Garcia, and Commissioners Flores and Lee took office, and before the court received any advice on the record concerning a budget emergency. There was no testimony that the new court considered money-saving alternatives other than widespread dismissals, or gave consideration to plaintiffs' qualifications, either for the positions they occupied or any other positions, except in two instances. And plaintiffs brought evidence from which the jury might have questioned the existence of the alleged emergency.

B. MOTION FOR NEW TRIAL

We review the district court's denial of defendants' motion for new trial for abuse of discretion. *Flanagan v. Aaron E. Henry Community Health Services Center*, 876 F.2d 1231 (5th Cir. 1989). In considering a new trial motion, the district court must decide whether the verdict is against the weight of the evidence, whether damages are excessive, or whether the trial was unfair to the movant for some other reason. *Forrester v. White*, 846 F.2d 29 (7th Cir. 1988). Defendants revisit their account of the facts in urging that the district court abused its discretion by denying their new trial motion, and argue that the verdict was motivated only by sympathy for the plaintiffs. Defendants complain that witnesses Ninfa Chavera, Janie Ruiz and Olivia Bernal were allowed to testify over objection regarding their terminations, despite the fact that Bernal and Ruiz were found to be confidential employees and Chavera worked for the County Treasurer. Defendants complain that circumstances regarding the damages award indicate that the jury was confused by the instructions and applied a "mechanical formula" rather than considering plaintiff-by-plaintiff damages evidence. Defendants complain that the jury found "bad faith" against plaintiffs Trevino and Martinez, despite also finding that those plaintiffs occupied "confidential" positions and thus were legally barred from bringing claims against the defendants. And the foreman initially forgot to sign the verdict form.

Defendants' arguments concerning the trial court's exercise of discretion are meritless. We have rejected defendants' claims of evidence insufficiency. The defendants' urge no valid legal argument against the court's instructions to the jury. We find no error in the district court's decision to allow the testimony of witnesses with personal knowledge of relevant evidence despite the

witnesses' employment status.[11] Nor do we find fatal inconsistency in the jury's returning a finding of bad faith against a confidential employee. Confidential status does not logically negate bad faith, it merely bars a legal claim by the employee.

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[11]Defendants did not object to Ruiz testimony on this ground, but rather that she lacked personal knowledge of the political affiliation of other individuals. The court overruled the objection and Ruiz confined her testimony to personal knowledge. Defendants objected to Chavera's testimony as irrelevant to the Commissioners court because she worked for the county treasurer. The court overruled this objection because the commissioners court, not the treasurer, is the body with authority to hire and fire county employees, and because Chavera had personal knowledge of relevant facts. But the court disallowed Chavera's testimony concerning statements by the county treasurer. Defendants objected to Olivia Bernal's testimony on several grounds, namely that she lacked personal knowledge, that she was not a party, and that she was asked to testify about the party affiliation of persons not party to the lawsuit. After Bernal explained that her husband was Judge Uresti's campaign manager, the court allowed her to testify, limited her testimony to her personal knowledge, and declared relevant her testimony concerning the party affiliation of dismissed former county employees who were not parties to this lawsuit.

III. CONCLUSION

In denying the appellants' motion for new trial or judgment NOV, the district court succinctly observed that "the jury, at every significant turn, credited plaintiffs' witnesses and not defendants' witnesses. Much in this case turns on the credibility of the witnesses, and the court concludes that there are several critical points in the trial where the jury accepted plaintiffs' versions, not Defendants'." We modify the judgment by reducing the damages awarded Salvador Garcia to $901.25, and as modified the judgment is affirmed.

AFFIRMED AS MODIFIED.

SNEED, Senior Circuit Judge, concurring.

I concur in Judge Reavley's opinion. Not too many years ago the defendants would have escaped the fate that has befallen them. The "spoils system" then functioned in many settings and very likely did so in Duval County. Moreover, 42 U.S.C. §1983 coexisted as it has since 1871 well before Theodore Roosevelt laid the foundations of our civil service system.

As Judge Reavley's opinion makes clear, the scope of 42 U.S.C. §1983 has been broadened to protect governmental employees not in confidential or policy making positions from the impact of the "spoils system." Old laws, like the Constitution itself, are always being shaped by the living to serve their then perceived good ends. So it is here. It matters not that Andrew Jackson, were he to return, would be puzzled by our result, or that 42 U.S.C. §1983 was designed in large measure to provide a remedy for recently freed slaves for violations of the 1866 Civil Rights Act.

Judge Reavley correctly reads 42 U.S.C. §1983 as we now understand it. Those who come later may see its meaning differently.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
MAR 25 1991
Jesse E. Clark, Clerk
By Deputy: /s/ illegible

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

ELIA J. GARCIA, ET AL.	§	
	§	
V.	§	C.A. NO. C-87-17
	§	
COUNTY OF DUVAL, ET AL.	§	

FINAL JUDGMENT

On the 14th day of May, 1989, the above entitled and numbered cause having been called for trial before the Honorable Hayden W. Head, Jr., the jury, having been empaneled and sworn, did on the 4th day of June, 1989, return its answers to special issues in favor of plaintiffs ANTONIA B. PEREZ, PABLO CHAVERA, ELPIDIO DE LA GARZA, JESUS SALAZAR, JUAN RAMIREZ, JUAN H. BARRERA, SALVADOR S. GARCIA, SYLVIA L. SAENA, LYDIA C. PEREZ, DIAMANTINA DAVILA, CECILIO ALANIZ, ORALIA ARRENDONDO, and RICHARD D. MARTIN, calling for the rendition of this judgment as follows:

It is ORDERED that plaintiffs LYDIA TREVINO AND LUIS MARTINEZ take nothing against defendants.

It is ORDERED that remaining plaintiffs recover judgment and that judgment be entered in favor of the following plaintiffs against defendants, jointly and severally, COUNTY OF DUVAL, TEXAS; and FRANK J. GARCIA, BOB LEE, SIGIFREDO FLORES, ALEJO GARCIA, and RICHARD BARTON, individually and in their official capacities, in the amounts shown next to plaintiffs' names:

1. ANTONIO B. PEREZ	$ 3,300.00
2. PABLO CHAVERA	$19,800.00
3. ELPIDIO DE LA GARZA	$16,940.00
4. JESUS SALAZAR	$20,580.00
5. JUAN RAMIREZ	$14,700.00
6. JUAN H. BARRERA	$20,780.00
7. SALVADOR GARCIA	$ 8,900.00
8. SYLVIA L. SAENZ	$15,000.00
9. LYDIA PEREZ	$ 7,940.00
10. DIAMANTINA DAVILA	$10,000.00
11. CECILIO ALANIZ	$15,000.00
12. ORALIA ARREDONDO	$ 4,770.00
13. RICHARD D. MARTIN	$15,040.00

Additionally, it is ORDERED that said plaintiffs ANTONIA B. PEREZ, PABLO CHAVERA, ELPIDIO DE LA GARZA, JESUS SALAZAR, JUAN RAMIREZ, JUAN H. BARRERA, SALVADOR GARCIA, SYLVIA L. SAENZ, LYDIA PEREZ, DIAMANTINA DAVILA, CECILIO ALANIZ, ORALIA ARREDONDO, and RICHARD D. MARTIN have and jointly recover judgment against defendant FRANK J. GARCIA individually in the amount of $6,000.00; against defendant BOB LEE individually in the amount of $6,000.00; against defendant SIGIFREDO FLORES individually in the amount of

$6,000.00; and against defendant RICHARD BARTON individually in the amount of $6,000.00.

It is ORDERED that judgment be entered in favor of plaintiffs and against all defendants jointly and severally for attorneys' fees in the amount of $32,500.00 and for all costs of court herein incurred to be taxed by the clerk of the court.

It is ORDERED that plaintiffs recover postjudgment interest from the date of judgment at the rate prescribed for judgments in United States Courts.

All payments hereunder to or for the benefit of plaintiffs pursuant to this judgment shall be made through the Law Offices of Pete Torres, Jr., 1815 San Pedro, San Antonio, Texas, 78212.

It is ORDERED that defendants FRANK J. GARCIA, individually and as County Judge of Duval County, Texas; BOB LEE, SIGIFREDO FLORES, ALEJO GARCIA, and RICHARD BARTON as County Commissioners of Duval County, Texas; and COUNTY OF DUVAL, TEXAS, reinstate the aforesaid plaintiffs to the positions they occupied at the time of their discharge as a vacancy develops in said positions, or a comparable position, and said defendants shall notify plaintiffs of said openings by mailing them notification in writing at their last known mailing address and giving said plaintiffs the first preference and right of first refusal to fill said vacancy.

ORDERED this 23 day of March, 1991.

/s/ H.W. Head, Jr.
HAYDEN W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
MAR 25 1991
Jesse E. Clark, Clerk
By Deputy: /s/ illegible

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

ELIA J. GARCIA, ET AL.	§	
	§	
V.	§	C.A. NO. C-87-17
	§	
COUNTY OF DUVAL, ET AL.	§	

ORDER DENYING MOTIONS FOR
JUDGMENT NOTWITHSTANDING THE VERDICT

The defendants have moved for judgment notwithstanding the verdict of the jury. The Court has reviewed the parties' motions and responses, the transcripts, and the verdict. The Court concludes that the jury verdict is supported by sufficient evidence to sustain it.

It is apparent that the jury, at every significant turn, credited plaintiffs' witnesses and not defendants' witnesses. Much in this case turns on the credibility of the witnesses, and the Court concludes that there are several critical points in the trial where the jury accepted plaintiffs' versions, not defendants'. The Court may not reassess those credibility decisions.

Although the defendants put on a persuasive case that their motivations in terminating the employees were budgetary, the jury rejected that theory; or if it did not, it did decide that the burden of the county's reduction fell more heavily and unlawfully so on those politically active for defendants' opposition.

The Court notes that in many instances the political activities of the plaintiffs were slight, *i.e.*, such as putting a sign in their yard. The Court has decided this is a sufficiently demonstrated First Amendment activity to let the jury verdict stand as to those plaintiffs, given testimony that the practice of Duval County politics is not only highly visible but peculiarly so with significant economic social overtones; that the terminations were undertaken without explanations given to the employees; that there was contradiction in defendants' testimonies; and that there was little or no demonstration of neutral and objective factors considered in terminating individuals.

Accordingly, defendants' motions for judgment notwithstanding the verdict are denied.

ORDERED this 25 day of March, 1991.

/s/ H. W. Head, Jr
HAYDEN W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

U.S. COURT OF APPEALS
FILED
AUG 12 1992
GILBERT F. GANUCHEAU
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2387

ELIA J. GARCIA, ET AL.,

Plaintiffs-Appellees,

versus

THE COUNTY OF DUVAL, TEXAS, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 7-1-92, 5 Cir., 198_, __F.2d__)

(AUGUST 12, 1992)

Before SNEED*, REAVLEY AND BARKSDALE, Circuit Judges.

PER CURIAM:

(x) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The Judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE

/s/
United States Circuit Judge

REHG-8

*Senior Judge of the Ninth Circuit, sitting by designation.

Supreme Court, U.S.
FILED
OCT 26 1992
OFFICE OF THE CLERK

No. 92-559

In The

Supreme Court of the United States

October Term, 1992

COUNTY OF DUVAL, *ET AL.*,

Petitioners,

vs.

ANTONIA PEREZ, *ET AL.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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No. 92-559

In The

Supreme Court of the United States

October Term, 1992

COUNTY OF DUVAL, *ET AL.*,

Petitioners,

vs.

ANTONIA PEREZ, *ET AL.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondents ANTONIA PEREZ, *et al.*, respectfully request that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners, County of Duval, *et al.*

STATUTORY AND CONSTITUTIONAL PROVISIONS

The Statutes and Constitutional Provisions which apply to this case are the First Amendment of the United States Constitution and 42 U.S.C. Section 1983.

STATEMENT

Petitioners' entire argument is based on assertions and premises that the jury failed to believe and accept.

Petitioners argue that they ran on a ticket stressing governmental economy and budget reform. They sought to impress the jury that they were motivated by budgetary stringencies and economic reform in terminating Respondents.

But the jury did not accept the arguments that Petitioners now present to this Court. The jury found that Petitioners' First Amendment activity was a substantial motivating factor in the termination decisions, the decisions would not have been made in the absence of the protected activity; that Petitioners did not act in good faith; and that Petitioners acted with malice (R. Pl. Vol. 3, Doc. Ent. 47 – Jury Issues).

Succinctly the trial court in denying Petitioners' Motion for Judgment notwithstanding the verdict made the cogent observation:

"The Court has decided this is a sufficiently demonstrated First Amendment activity to let the jury verdict stand as to those Plaintiffs, given testimony that the practice of Duval County politics is not only highly visible but peculiarly so with significant economic social overtones; that the terminations were undertaken without explanations given to the employees; that there was contradiction in Defendants' testimonies; and that there was little or no demonstration of neutral and objective factors considered in terminating individuals". (Appendix C, Petitioners' Brief).

Thus, Petitioners' argument in its factual statement flies in the face of the jury verdict and the fact that an appeals court is not free to weigh the evidence or pass on the credibility of the witnesses or to substitute its judgment of the facts for that of the jury. Instead, it must view the evidence most favorable to the prevailing party and give that party the benefit of all reasonable inferences from the evidence. See *Federal Practice and Procedure*, Wright & Miller, Vol. 9, Section 2524, pp. 543-545.

Some cogent observations in the record suffice to show the implausibility of Petitioner's position that they were motivated by budgetary concerns and not by political animus that resulted in the termination of Respondents.

THE BUDGET PROBLEM

With reference to the budget problem, the county auditor, Mr. Hinojosa, had indicated to the Commissioner's Court in October 1986 that there was a need to cut $92,000.00 from the budget by the end of the year (PX-44, R-Tr. Vol. III, p. 386). A question arose as to whether that problem had been corrected by the previous commissioner's court under Judge Uresti and whether there had been a 6% reduction in salaries to meet that $92,000.00 deficit (R-Tr. Vol. II, p. 387).

In speaking of the budget problem, Petitioner Frank Garcia, admitted that he erroneously stated that Judge Uresti had budgeted $10 Million for the year 1987 and that was not a correct figure (R-Tr. Vol. III, p. 394). He had

claimed that Judge Uresti had overbudgeted by $10 Million (R-Tr. Vol. III, p. 389). Judge Uresti in fact had provided for a budget of $6.6 Million (R-Tr. Vol. III, p. 393). The budget for 86-87 was for $6.6 Million and the previous board had already gone through a budget reduction process to take care of a $3.6 Million shortfall (R-Tr. Vol. III, p. 395-396, PX-48). The budget provided for the collection of $900,000.00 of delinquent taxes (PX-48). Though there was testimony by Petitioners critical of this expectation, nonetheless, Petitioners still provided for $700,000.00 in delinquent tax collections in the 1987 budget (R-Tr. Vol. III p. 409) And the problem of not collecting delinquent taxes could not have been in the minds of Petitioners in January 1987. There was no report on the status of tax collections from the tax collection attorneys until June 1987 (R-Tr. Vol. III, p. 409).

The supposed budget problem involved a $3.6 Million shortfall from the previous year. Former Judge Frank Garcia, Petitioner, admitted in his testimony that the previous commissioner's court in October 1986 in adopting the budget, tried to correct that problem by not spending that $3.6 Million (R-Tr. Vol. III., p. 397).

There were other nuances about the budget that was alluded to in the evidence. For example, Duval County traditionally has collected garbage for the Cities of San Diego, Benavides and Freer although not required to (R-Tr. Vol. III, p. 398) and the cities are not charged (R-Tr. Vol. III, p. 398). The County Auditor testified that the 85-86 budget of $10.1 million was reduced to $6.6 Million for 86-87 (R. Tr. Vol. V, p. 843). He added that he did not report the budget problem to the Commissioner's Court in January 1987; in fact, the first time he reported this

problem to Commissioner's Court was in March 1987 (R-Tr. Vol. V, p. 816). He also said there was some additional revenue to the County after the 86-87 budget year in the amount of $650,000.00 because a bonded debt in that amount was retired (R-Tr. Vol. V, p. 817).

The issue of the number of County employees was contradictory. The Auditor testified about expenditures but did not know how much the County spent in 1987 for claim employees and was not asked to bring any records pertaining to the number of claim employees (R-Tr. Vol. V, p. 808). He testified at trial that before the dismissals there were 314 employees in January 1987 (R-Tr. Vol. VI, p. 853). But earlier at the time of his deposition, he had alluded to 260 (R-Tr. Vol. V, p. 854). He had provided a list of employees hired since January 1987 but had left names off the list (R-Tr. Vol. V, pp. 821-822). There was also a discrepancy in his testimony on the amount of delinquent taxes collected.

The 1986-1987 budget indicated that $4.1 Million in delinquent taxes were due the County (R-Tr. Vol. V, p. 813).

The taxes were not collected but the auditor could not account for the discrepancy (R-Tr. Vol. V, p. 814).

THE TERMINATED EMPLOYEES

The central factual dispute in this case involved the reason for termination of Respondents' employment with Duval County in January 1987 as soon as Petitioners took office. Although Petitioners testified that the decision to

terminate Respondents was motivated by the need to balance the budget in the face of alleged budgetary problems, their explanations were rejected by the jury in light of the overabundance of testimony that such reasons were pretextual. Respondents rejected the budgetary concern as "pretextual" because Petitioners immediately replaced the terminated employees with persons who were politically affiliated with Petitioners (R. Pl. Vol. 4, Doc. Ent. 1, Complaint p. 5). The evidence establishes and the jury found that the Respondents were terminated for supporting or voting for political opponents of Petitioners in the 1986 primary election (Special Issues 1-6, R. Pl. Vol. 3, Doc. Ent. 47); that Petitioners would not have discharged Respondents irrespective of their political activity (Special Issues 7-11, R. Pl. Vol. 3, Doc. Ent. 47); that Petitioners, in their decision to terminate Respondents, did not act in good faith (Special Issues 13-17, R. Pl. Vol. III, Doc. Ent. 47); and that Petitioners acted with malice or reckless disregard of Respondents rights (Special Issue 20, R. Pl. Vol. III, Doc. Ent. 47).

Employees who were terminated had supported the losing candidates, invariably were replaced by persons who had supported Petitioners and were not given reasons for the termination like Sylvia Saenz (R-Tr. Vol. I, pp. 4-16) and Lydia Perez (R-Tr., Vol. I, pp. 42-52). Antonia Perez was discharged and had campaigned for Judge Uresti and witnessed persons who campaigned for Judge Garcia, all of whom got hired by the new administration (R-Tr., Vol. I, pp. 71-81, R.-Tr., Vol. II, p. 316) and in one instance, a new position was created for Berta Guerra, a campaigner for one of the Petitioners (R-Tr. Vol. II, p. 79).

Similarly, Juan Barrera (R-Tr. Vol. I, pp. 109-115), Luis Martinez (R-Tr. Vol. I, p. 132) Oralia Arredondo (R-Tr. Vol. I. pp. 155-158) and Diamantina Davila (R-Tr. Vol. II, p. 302), and Cecilio Alaniz (R-Tr. Vol. II, pp. 544-550) were abruptly terminated.

Mr. Alaniz was replaced by a Ramiro Cantu (R-Tr. Vol. III., p. 559).

Blanca Garza who died before this case was tried, took one week off to campaign for Judge Uresti and Commissioner Wiederkehr (who was defeated by Petitioner Lee), was terminated (R-Tr. Vol. III, pp. 560-561).

Richard Martin who had supported Judge Uresti was told his job as a mechanic was eliminated, but the job went to Petitioner Judge Garcia's brothers (R-Tr. Vol. IV, pp. 606-608).

Respondent Pablo Chavera, helped the defeated candidates in the 1986 election, was terminated in January 1987 and replaced by a man who helped Petitioner Flores in the election (R-Tr. Vol. IV, pp. 701-703). Petitioner Flores told him that he would be laid off if he didn't vote for him (R-Tr. Vol. IV, p. 704).

The rapidity of the terminations – all the Respondents were fired by January 15, 1987 – and within two weeks in office, the new administration had fired thirty-eight (38) employees (R-Tr. Vol. II p. 317) without providing reasons, yet Petitioners managed to re-hire new employees and created new positions for some (R-Tr. Vol. II, p. 347).

This situation is in a community where the government is the biggest employer (R-Tr. Vol. II, p. 311), where

the Petitioner, Judge Garcia, knows who the players are and if they are actively involved and what side they are on (R-Tr. Vol. II, p. 313) and where political patronage admittedly has played a large part in County politics (R-Tr. Vol. II, p. 315).

One of the Petitioners, Commissioner Flores admitted the County had fired forty-six (46) employees and hired thirty-eight (38) in addition to thirty-five (35) claims employees not listed on the budget (R-Tr. Vol. II. p. 198).

While Petitioner, Judge Garcia claimed he replaced one employee because the replacement Palmira Carrillo, was better qualified, he did not know Lydia Trevino who Carrillo replaced. He did not check her performance, he had no personnel files on people and he had no evaluations on the terminated employees (R-Tr. Vol. II, pp. 320-322).

Petitioner Judge Garcia in an apparent contradiction testified that there had been no meetings between him and other commissioners in December 1986 (R-Tr. Vol. III, p. 384). Yet, he was contradicted by Commissioners Lee and Barton that they had met at Commissioner Barton's ranch in December 1986 to discuss County reorganization (R-Tr. Vol. III, p. 503, 504, R. Tr.-Vol. IV, p. 594).

Respondents that worked at the civic centers were fired and told the positions of Director were being eliminated. The directors were supporters of the old administration (R-Tr. Vol. II. pp. 191-194). Yet, supporters of the Petitioners were placed in their stead and at least in one case, at a higher salary (R-Tr. Vol. II, pp. 195-196).

Petitioners were sworn in on January 1, and posted notice for a special meeting to involve personnel actions on January 5 (R-Tr. Vol. II, p. 349). At the meeting, positions, departments and names were discussed (R-Tr. Vol. IV, p. 593).

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. PETITIONERS PRESENT AN INSUBSTANTIAL FEDERAL QUESTION BECAUSE THE DECISION BY FIFTH CIRCUIT COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S DECISIONS IN *MT. HEALTHY CITY SCHOOL DISTRICT BOARD OF EDUCATION V. DOYLE*, 429 U.S. 274, 50 L.Ed.2d 471, 97 S. Ct. 568 (1977) AND WITH *RUTAN V. REPUBLICAN PARTY OF ILLINOIS*, 110 S. Ct. 2729 (1990) AND WITH *ELROD V. BURNS*, 427 U.S. 347, 49 L.Ed.2d 547, 96 S. Ct. 2673 (1976) AND OTHER LOWER COURT DECISIONS AND DECISIONS OF THE FIFTH CIRCUIT COURT OF APPEALS.

This Court in *Mt. Healthy, supra,* held that even though the terminated employee could have been discharged for no reason whatever, he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutional protected First Amendment freedoms, citing *Perry v. Sindermann,* 408 U.S. 593, 33 L.Ed.2d 570, 92 S. Ct. 2694 (1972).

The Court went on to say that if a nonpermissible reason e.g. exercise of First Amendment rights, played a substantial part in the decision not to renew – even in the face of other permissible grounds – the decision may not stand.

The Court established a standard in *Mt. Healthy* that the initial burden is on the employee to show:

1. that his conduct was constitutionally protected;

2. that this conduct was a substantial or motivating factor in the Board's decision not to re-hire him;

Having met that burden, the Board must show by a preponderance of the evidence as a defense to its termination action that it would have reached the same decision as to Respondents' reemployment even in the absence of the protected conduct.

In *Perry v. Sindermann, supra,* at 408 U.S. 597, this Court noted that:

"For at least a quarter century, this Court has made clear that even though a person has no right to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests, especially his interest in freedom of speech . . . we have applied the principle to denials of public employment (citing authorities)".

In *Pickering v. Board of Education,* 391 U.S. 563, 20 L.Ed.2d 811, 88 S. Ct. 1731 (1968), this Court held that an employee's right to speak on issues of public importance cannot furnish the basis for his dismissal.

In *Elrod v. Burns,* 427 U.S. 347, 49 L.Ed.2d 547, 96 S. Ct. 2673 (1976), this Court held that the practice of

patronage, especially patronage dismissals placed severe restrictions on freedoms of political belief and association which could be justified only if the government showed that patronage dismissals furthered some vital governmental end by a means that was least restrictive of freedom of belief and association in achieving such end . . . and that any contribution of patronage dismissals to the democratic process cannot override the severe encroachment on First Amendment freedoms.

Justice Stewart in a concurring opinion at 427 U.S. 375, observed that the single question involved in the case was whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs and held he cannot.

Petitioners place emphasis on use of the term "sole" ground. However, as applied to the facts of this case, the jury made a determination pursuant to the *Mt. Healthy* standard that the motivating factor for Respondents' termination was their support of opposition candidates and as noted above, there was ample evidence to support such a conclusion. Petitioners agree in the pretrial order that this was the relevant issue to be decided by the jury and in their failure to complain at the trial level or to raise the issue whether their political involvement was the "sole" reason for their termination, have waived such a complaint, *Fraternal Order of Police, Hobart Lodge #121 v. City of Hobart,* 864 F.2d 551 (7th Cir., 1988) at p. 554.

The Court in *Elrod v. Burns* noted at 427 U.S. 356 political belief and association is at the core of those

activities protected by the First Amendment which protects political association as well as political expression . . . , there can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments" at p. 427.

In *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729 (1990), the *Elrod v. Burns* principles were expanded to promotions, transfers and recalls after layoffs. The Court said at p. 2737, that promotions, transfers and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees.

Conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition of employment, unless the government has a vital interest in doing so, *Rutan*, p. 2739.

As in the instant case, the Court noted no such compelling government interest was shown.

The Court in *Rutan*, also answered a question raised by Petitioners in the instant case in their petition at p. 12. They decry that the issue in *Rutan* and other cases cited was narrow, and that the Fifth Circuit decision is inconsistent with this Court's recognition of the substantial interest of government in carrying out "policies which the electorate has sanctioned."

The Court noted in *Rutan*, at 110 S. Ct. 2740, citing and quoting from *Perry v. Sindermann*, that the State's action is subject to federal judicial review and will not be

upheld if a termination is motivated by constitutionally impermissible reasons.

Respondents met their burden of proof in this case that they were discharged for constitutionally impermissible reasons.

A Plaintiff need only prove that the protected activity was a "substantial" factor in the decision to terminate; it is not necessary to demonstrate that the dismissal was based solely on these activities, *Mt. Healthy City School District v. Doyle, supra.* The 5th Circuit has applied the *Mt. Healthy* standard in retaliatory discharge cases, *Robinson v. Boyer,* 825 F.2d 64 (5th Cir., 1987); *Montgomery v. Trinity Independent School District,* 809 F.2d 1058 (5th Cir. 1987); *Avery v. Homewood City Board of Education,* 674 F.2d 337 (5th Cir., 1982), cert. denied, 461 U.S. 943, 103 S. Ct. 2119, 77 L.Ed.2d 1300 (1983); *Goss v. San Jacinto Junior College,* 588 F.2d 96 (5th Cir., 1979); *Burris v. Willis Independent School District,* 713 F.2d 1087 (5th Cir., 1983).

The Fifth Circuit's decision in this case is consistent with prior decisions. The decision is not inconsistent with *Kinsey v. Salado Independent School District,* 950 F.2d 988 (5th Cir., 1992), because *Kinsey* was the school superintendent who was terminated by the new board who he had publicly opposed. He was a confidential, policymaking employee. The Board was entitled to a superintendent that shared its management philosophy. The issues in that case are not applicable here.

Respondents met their burden by uncontradicted proof that they had supported defeated candidates Uresti and Saenz in the 1986 election; that as soon as Judge Garcia took office in January 1987, Respondents were

terminated, that no reasons were given for their abrupt terminations, nor were they interviewed. Though Petitioners claimed budget problems as motivation for the terminations, new positions were in some cases created and the budgetary stringencies were at best, superficial.

Respondents established the initial threshold requirement of the *Mt. Healthy* standard and the Petitioners failed to meet their burden which shifted to them to prove by a preponderance of the evidence that Respondents would not have been dismissed "but for" their political affiliations, *Mercado-Melendez v. Aponte-Roque,* 829 F.2d 255 (1st Cir., 1987); *North Mississippi Communications, Inc. v. Jones,* 874 F.2d 1064 (5th Cir., 1989).

The discharges could have been justified had Petitioners demonstrated that Respondents would have been terminated regardless of the constitutionally protected conduct, *McKinley v. City of Eloy,* 705 F.2d 1110 (9th Cir., 1983).

This they failed to do and the jury proceeded to find that Petitioners did not act in good faith, that they acted with malice or reckless disregard of Respondents' rights and awarded to Respondents damages, all of which findings have ample evidentiary support.

The absence of a reason for termination adds weight to the allegation that Respondents' discharge resulted from constitutionally impermissible reasons; *Robinson v. Wichita Falls & North Texas Com. Act. Corp.,* 507 F.2d 245 (5th Cir., 1975).

While the Supreme Court provided no guidance on how the *Mt. Healthy* standard can be met, "it is clear that

Plaintiff need not present direct evidence . . . ", *Clark v. Library of Congress*, 750 F.2d 89 (D.C. Cir., 1984) at p. 101; and the Court can look to "timing, hostility and even admissions that relate to motivation for the Defendant's conduct" (*Clark, supra*, at p. 1068).

Thus, the Fifth Circuit in *Burris v. Willis Independent School District, Inc., supra*, where the District Court had entered a directed verdict for the school district, the Court in remanding, noted at p. 1095; our inquiry "is whether there is substantial evidence supporting the board's claim that Burris' protected conduct, if it existed, did not play a substantial role in the board's decision not to renew his contract. As already mentioned, there was evidence that Burris associated with members of the old board majority on at least one of the political issues involving the school. One of the first acts by the new faction, upon gaining control of the board, was to decide not to renew Burris' contract . . . we conclude that a reasonable juror could conclude that this decision was motivated to a substantial degree by Burris' protected activity."

Thus, under facts much less aggravating than those in the instant case, the Fifth Circuit ruled in favor of the terminated employee on the *Mt. Healthy* issue whether the Plaintiff's constitutionally protected activity was a substantial or motivating factor in the decision not to renew his contract. Once the Plaintiff meets this burden, the burden of proof shifts to the Defendant to show by a preponderance of the evidence that it would have reached the same decision as to reemployment even in the absence of the protected conduct; *Burris v. Willis Independent School District, supra*, at p. 1093; *Reeves v.*

Claiborne County Board of Education, 828 F.2d 1096 (5th Cir., 1987); *Bueno v. City of Donna*, 714 F.2d 484 (5th Cir., 1983).

The Respondents in this case demonstrated and the jury found that Respondents supported and voted for political opponents (Uresti and Saenz) of Petitioners in the 1986 primary election. (Jury's response to Special Issue No. 1).

The evidence was uncontradicted that those persons discharged by Petitioners in January 1987 had actively supported either former Judge Uresti or Commissioner Saenz. More importantly, most if not all the Respondents were immediately replaced by persons loyal to Judge Garcia and who had supported Judge Garcia. While the only direct evidence of political motivation was that respondent Pablo Chavera who testified that Commissioner Flores had told him that people who did not support him (Flores), were going to be terminated (R-Tr. Vol. IV, p. 704), there was ample circumstantial evidence to support the findings at Special Issues 2-6. The jury could infer from the evidence presented that Respondents' political activity was a substantial or motivating factor in Petitioners' decision to discharge them. The rapidity of their dismissals within days after the new judge and two commissioners were sworn in, coupled with the immediate appointment of replacements, pretextual reasons given without consideration of Respondents' qualifications, (such as in the case of Mr. Chavera who wasn't even asked if he could operate the heavy equipment, R-Tr. Vol. IV., p. 703), dismissals of longtime employees while their replacements were being interviewed (testimony of Janie Ruiz concerning the firing of

Cecilio Alaniz), and the passive attitude of some of the Petitioners (Commissioners Flores and Garcia) concerning the dismissals, all give support to the jury's findings. Equally significant and reflecting the animus of Petitioners' arbitrary conduct was the fact that not one single discharged employee was interviewed or evaluated before the termination action. A constitutional litigant need not present direct evidence to discharge his or her threshold *Mt. Healthy* burden. Various courts have held that circumstantial evidence may be used to prove that constitutionally protected conduct was a substantial or motivating factor in a contested employment decision; *Rosario-Torres, et al. v. Hernandez-Colon, et al.*, 875 F.2d 351 (1st Cir., 1989), at p. 355, citing *Clark v. Library of Congress*, 750 F.2d 89 (D.C. Cir., 1984); *Allaire v. Rogers*, 658 F.2d 1055 (5th Cir., 1981).

The facts in the instant case are not generally dissimilar to those in *Conklin v. Lovely*, 834 F.2d 534 (6th Cir., 1987), where the appeals court reversed a summary judgment entered by trial court against the Plaintiff who was not given reasons for her termination and had supported a defeated candidate.

Forty-six employees were fired in January 1987 but thirty-eight employees were hired and thirty-five claims employees were not listed on the budget (R-Tr. Vol. II., p. 198).

Judge Garcia hired Palmira Carrillo to replace Lydia Trevino because he figured she was better qualified but he didn't know Lydia Trevino and didn't check her performance and he had no evaluations nor files on people (R-Tr. Vol. II, pp. 319-322).

In this respect, its certainly significant that Palmira Carrillo was the daughter-in-law of a former state representative (R-Tr. Vol. II, p. 314); she was then President of the Board of Trustees of the Benavides Independent School District, married to the brother-in-law of Petitioner Flores (R-Tr. Vol. II, p. 210). She was a campaigner for Judge Garcia (R-Tr. Vol. I, pp. 78-79).

There are many other factors that have to be assessed in the testimony; the fact that political patronage over the years has played a large part in Duval County politics (R-Tr. Vol. II, p. 315); that the biggest employers in Duval County are the County, the City, the Water District and the School and that Judge Garcia's brother is the head of the School Board (R-Tr. Vol. I, p. 113); that Duval County is a highly political community (R-Tr. Vol. II, p. 212) and that the 1986 election was a hotly contested election (R-Tr. Vol. III, p. 882).

The further test under the *Mt. Healthy* analysis is that the Defendant has to show that it would have made the same employment decision in the absence of the protected conduct, *Mt. Healthy,* 429 U.S. at 287, 97 S. Ct. at 576. Once a Plaintiff has demonstrated that an impermissible motive played a motivating part in his adverse treatment, the burden shifts to the Defendant to prove by a preponderance of the evidence that it would have made the same decision in the absence of the protected conduct; *North Mississippi Communications Inc. v. Jones,* 874 F.2d 1064 (5th Cir., 1989). Citing *Price Waterhouse v. Hopkins,* 109 S. Ct. 1775, 104 L.Ed.2d 268. The 5th Circuit in the *North Mississippi Communications Inc.* case, *supra,* noted at p. 1069 "the Supreme Court . . . recently stated in strong language that the mere assertion or demonstration

that legitimate reasons existed for adverse action is not enough to satisfy the employer's burden of proof."

The Petitioners in this case failed to show that they would have made the same decision in the absence of the protected conduct and this is reflected in the jury's answers to special issues 7-11. Though Petitioners cited budgetary stringencies, that issue was embroiled around Petitioner's tax collection practices, their apparent failure to consider alternatives and their immediate rehiring of replacements.

In *Barrett v. Thomas,* 649 F.2d 1193 (5th Cir., 1981), reh. den., 656 F.2d 700, cert. denied, 456 U.S. 925, 72 L.Ed.2d 455, 102 S. Ct. 1992, the Court ruled that once Plaintiffs made a prima facie showing that impermissible reasons motivated the challenged personnel decisions, then the Defendant had to rebut such a showing with sufficient evidence of nonpolitical motives for such conduct. This Petitioners failed to do.

That Petitioners citing of budgetary stringencies as the reason for termination of Respondents' employment was pretextual can be discerned from evidence that Judge Garcia's protests about a $3.6 Million deficit were spurious (there was none, R-Tr. Vol. III pp. 389-396), from the fact that the supposed budgetary problems became known to Petitioners in January 1987 as a result of which they terminated Respondents, yet, they had no report on the status of tax collections until June 1987 (R-Tr. Vol. III, p. 409) and they did not hear from their auditor until March 1987 (R-Tr. Vol. V, p. 816).

To sustain the Petitioners' proof that there were budgetary stringencies that necessitated the terminations,

Petitioners would have had to prove that there were in fact budget problems. But their county auditor's testimony was imprecise and less than clear matching in lack of clarity the testimony of Judge Garcia whose pronouncements of a $3.6 Million shortfall were by his admission, not correct (R-Tr. Vol. III, p. 393-397).

Petitioners failed to meet their burden of proving by a preponderance of the evidence that Respondents were terminated by reason of budget problems.

Petitioners' contentions before this Court that the Fifth Circuits decision improvidently infringes on the Petitioners substantial interest – in carrying out policies that the electorate has sanctioned is not borne by the record.

Petitioners suggest that the Court of Appeals utilized an improper standard of review in evaluating Petitioners' assertion of budgetary justification for terminating Respondents' employment citing *Pilarowski v. Macomb Health Department,* 841 F.2d 1281 (6th Cir.), cert. denied, 109 S. Ct. 133 (1988). But that case was one that involved the termination of Plaintiff on account of budget cuts and the Court held simply that Plaintiff failed to present sufficient proof that the decision to discharge him was made "by reason of his exercise of First Amendment freedoms".

II. THE FIFTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF THE FOURTH AND SEVENTH CIRCUITS

The Fifth Circuits decision in this case turned solely on the issue of whether Respondents' terminations were motivated by political animus.

Employment decisions generally are administrative. Administrative acts are not protected by legislative immunity, *Tenney v. Brandhove*, 341 U.S. 367, 71 S. Ct. 783, 95 L.Ed. 1019 (1951), cited by 7th Circuit in *Rateree v. Rockett*, 852 F.2d 946 (7th Cir., 1988).

State legislators are absolutely immune from lawsuits when acting in their legislative capacity, *Tenney, supra.* But in *Rateree* cited by Petitioners, the Court noted at p. 951, that Commissioners are protected from liability when they act in their legislative capacity but when they act administratively, they are not.

The Court found in *Rateree* that the actions of the Commissioners in adopting the budget and eliminating jobs were legislative and thus immunity attached. But there, the budget ordinance eliminated the jobs and no one was hired to replace the Plaintiffs, *Rateree* at p. 950 and noted that Defendants did not fire the Plaintiffs but rather eliminated their jobs from the city budget.

Thus, there is a distinction between the 7th Circuits holding in *Rateree* and the instant case where the Respondents were fired and the budgetary constraints seem to have arisen as an afterthought. There was no ordinance or legislative enactment that deserves immunity. The act of discharging Respondents was administrative.

Moreover, a legislator can be held liable for a termination decision violative of an employee's constitutional rights, *Davis v. Passman*, 442 U.S. 228, 60 L.Ed.2d 846, 99 S. Ct. 2264 (1979); as can a Judge who normally is shielded by absolute judicial immunity but nonetheless can be held liable under 42 U.S.C. 1983 for an impermissible employment decision, *Forrester v. White*, 484 U.S. 219, 98 L.Ed.2d 555, 108 S. Ct. 538 (1988).

Beyond that, the Petitioners did not raise the legislative immunity issue in the trial court, thus have waived that defense, *Fraternal Order of Police, Hobart Lodge No. 121, supra* at p. 554, because the government official seeking immunity has the burden of showing the exemption from personal liability, *Rateree* at p. 950.

Similarly, the Fourth Circuits' opinions cited by Petitioners are distinguishable and do not conflict with the Fifth Circuit's decision in this case. Although, the Courts held that local governmental bodies were immune from liability, a budget ordinance had been adopted in both instances so the actions taken were – unlike the instant case – legislative actions, *Hollyday v. Rainey*, 964 F.2d 1441 (4th Cir., 1992); *Baker v. Mayor & City Council of Baltimore*, 894 F.2d 679 (4th Cir., 1990).

CONCLUSION AND PRAYER

This Court should deny the writ of Certiorari because Petitioners present an insubstantial federal question and the Fifth Circuit's decision in this case is consistent with the Supreme Court's prior decisions and with its own and other circuit court decisions.

Respondents pray the Writ of Certiorari be denied.

Respectfully submitted,

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